(3)

No. 85-513

Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

GRAHAM LEE KENDALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

PETITIONER'S REPLY MEMORANDUM TO THE BRIEF IN OPPOSITION OF RESPONDENT THE UNITED STATES

STEPHEN JONES
of
JONES, BLAKLEY & JENNINGS
P.O. Box 472
Enid, Oklahoma 73702
405/242-5500

Counsel of Record for Petitioner Graham Lee Kendall

January, 1986

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Is the evidence sufficient to support a conviction for conspiracy to possess marijuana with intent to distribute when the accused's single affirmative action is to introduce two principals who only subsequently reach an agreement?

2. Does the Travel Act (18 U.S.C. § 1952) allow conviction for "causing" a violation of that Act, absent proof that the accused had knowledge he was causing interstate travel and absent proof he had knowledge of a business enterprise?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

SUPPLEMENTAL STATEMENT OF THE CASE 1

SUMMARY OF REPLY 2

I. The respondent's brief misstates the issues before this Court, and misstates the facts which are critical to this Court's determination of whether to grant certiorari 3

II. The government's response misstates the Travel Act question and does not squarely address the issues before this Court 7

CONCLUSION 10

CERTIFICATE OF SERVICE follows Reply.

TABLE OF AUTHORITIES

Cases	PAGE(S)
Grunewald v. *United States*, 350 U.S. 391 (1957)	10
In re Winship, 397 U.S. 358 (1970)	3
Jackson v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)	3
Krulewitch v. *United States*, 336 U.S. 440, 93 L.Ed. 790, 69 S.Ct. 716 (1949)	10
Laing v. *United States*, 423 U.S. 161, 46 L.Ed.2d 416, 96 S.Ct. 473 (1976)	7
Rewis v. *United States*, 401 U.S. 808, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971)	2, 8, 10
United States v. *Alsobrook*, 620 F.2d 139 (6th Cir. 1980)	7
United States v. *Feola*, 420 U.S. 671, 43 L.Ed.2d 541, 95 S.Ct. 1255 (1975)	7
United States v. *Gallo*, 763 F.2d 1504 (6th Cir. 1985)	7
United States v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980)	6
United States Code	
18 U.S.C. § 2	8
18 U.S.C. § 1952(b)(1)	9
21 U.S.C. §§ 841(a)(1) and 846	4

No. 85-513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GRAHAM LEE KENDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

PETITIONER'S REPLY MEMORANDUM TO THE BRIEF IN OPPOSITION OF RESPONDENT THE UNITED STATES

SUPPLEMENTAL STATEMENT OF THE CASE

Graham Kendall's petition to this Court to grant a writ of certiorari to the United States Court of Appeals for the Tenth Circuit was docketed on the 25th day of September 1985. The government waived its right to file a response to the petition on October 2, 1985. This Court considered the petition on October 18, 1985, and requested that the government file a response brief to the petition. The government's Brief in Opposition to the Petition for Certiorari was filed on December 4, 1985. The case has not yet been rescheduled for conference consideration by this Court. This Memorandum is filed pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, and in response to the government's Brief in Opposition filed herein on December 4, 1985.

SUMMARY OF REPLY

The respondent is trying to appeal to this Court's well known and justified refusal in most instances to review allegations of the insufficiency of evidence to sustain a lower court's holding, by asserting that such is the issue here (O.B. Page I, pgs. 5-7),[1] but the issues presented by the petition are much different, crucially different. Graham Kendall claims:

1. The Tenth Circuit, in conflict with the Ninth Circuit, erred in choosing *the standard* to weigh the sufficiency of the evidence for petitioner's conviction of conspiracy (Count I);

2. The Tenth Circuit in upholding his Travel Act conviction (Count V), in conflict with decisions of the Sixth Circuit, erred when it held "foreseeability" by him of interstate travel by others was sufficient for a conviction;

3. The decision as announced by the court below cannot stand because it conflicts with this Court's holding in *Rewis* v. *United States*, 401 U.S. 808, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971), by impermissably broadening the ambit of the Travel Act.

---

[1] O.B. references are to the Opposition Brief filed by the United States Government.

I. THE RESPONDENT'S BRIEF MISSTATES THE ISSUES BEFORE THIS COURT, AND MISSTATES THE FACTS WHICH ARE CRITICAL TO THIS COURT'S DETERMINATION OF WHETHER TO GRANT CERTIORARI.

The government's response first misstates the question presented to this Court (O.B. Page I, pgs. 5-7). The immediate issue is whether the Court should grant certiorari to resolve the conflict between the Tenth Circuit and the Ninth Circuit in determining whether the elements of a conspiracy have been proven. This is not a sufficiency of the evidence question, but a question of whether the standard to review sufficiency of the evidence is consistent with the requirements of due process. Thus the question presented by the petition is of a kind raised by the petitions for certiorari in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 278 (1979), and *In re Winship*, 397 U.S. 358 (1970), both of which the Court granted and ruled on the merits.

The government's brief does not squarely address the issue raised by the petition for certiorari, and the factual references in the argument of respondent fall outside utter and unswerving accuracy in at least three particulars which are critical to this Court's evaluation of the conflict between the Ninth and Tenth Circuits. Contrary to the assertions in the government's brief (O.B. pages 5-7), the record clearly reflects that:

1. Graham Kendall expected no payment whatsoever from the participants in the conspiracy;

2. Graham Kendall did not participate and was not present during the customization of Callahan's aircraft, and Graham Kendall did not hide or agree to hide the aircraft;

3. Graham Kendall did not agree to obtain a large quantity of marijuana for which he would be compensated, nor did he agree to further such a conspiracy.

The accuracy of the record on these three particulars is critical to this Court's evaluation of the conflict between the Circuits, and an accurate portrayal of the relevant inquiry made by the court below. On the facts as truly reflected in the record, certiorari should be granted, but if the facts were as the government has alleged the question might be doubtful. For this reason, Graham Kendall takes issue with the statement of facts as presented in the argument portion of the government's brief (O.B. pgs. 5-7). The issue is whether the correct *standard* was used by the Tenth Circuit to determine whether the evidence was sufficient to prove an element necessary for conviction under 21 U.S.C. §§ 841(a)(1) and 846. In conflict with decisions of the Ninth Circuit the court below failed to question whether the evidence was sufficient to prove that Graham Kendall had *joined an illegal agreement with a specific illegal objective*.

The government by its response implicitly agrees the conviction for conspiracy to possess marijuana with intent to distribute cannot stand against petitioner unless he furthered a specific illegal objective of the criminal conspiracy. It attempts to sidestep the issue presented by the petition by implying the Tenth Circuit did indeed make such a finding, but to advance the argument the government misstates the factual record.

The first error is the assertion that Graham Kendall was aware that Geittmann desired an individual such as Callahan "to serve in his smuggling network" (O.B. pg. 6).

An analysis of those portions of the record cited by the government, and indeed the record as a whole, to support this proposition reveals that Geittmann made no indication to Graham Kendall whatsoever that he wished to hire Callahan for any illegal purpose.

The government claims that the evidence, also established that petitioner

> . . . was offered (8R. 203) and expected (10R. 593, 671) payment, and that he held up agreement between Callahan and Geittmann until his differences with Callahan were settled to his satisfaction. (8R. 208-209; 10R. 657 to 658, 662) (O.B. pg. 6)

This claim is both inaccurate and seriously misleads the Court. Those portions of the record cited by the government indicate that Callahan testified that Kendall had *refused* any payment for placing the call to Geittmann.[2] Further, the assertion as made by the government implies that the disagreement between Kendall and Callahan was in reference to the offer of payment allegedly made by Callahan. However, an analysis of the record reveals that Kendall's distrust of Callahan was based upon some confusion on paperwork regarding an unrelated aircraft transaction some two or three years prior to this time (10R. 657), or stemmed from Kendall's dislike of Callahan and loss of an anticipated aircraft sale to him (8R. 292).

The most critical misstatement of the record is contained in the government's assertion that

> The evidence demonstrated that petitioner and Callahan agreed that Callahan's aircraft would be fitted with a supplemental fuel tank and would remain hid-

[2] Graham Kendall maintains that no offer was made to him.

> den at petitioner's place of business pending Callahan's rendevous with Geittmann. (8R. 214-216) (O.B. pg. 6)

At most Callahan's testimony indicates that he told Graham Kendall that *Callahan* intended to have a fuel bladder reinstalled in the aircraft, and that *Callahan* intended to park the plane behind a hangar (8R. 215). Callahan's testimony indicates that Graham Kendall *acquiesced* in his decision to park the plane, but does not indicate that the petitioner knew or cared why Callahan was awaiting Geittmann's call.

Contrary to the government's assertion, the evidence does not indicate that Graham Kendall agreed to obtain any quantity of marijuana. He did not agree to be compensated for the telephone call to Geittmann (8R. 279).

Kendall did not assist and was not present at either the first or second bladder tank installations (both of which occurred on weekend nights) (8R. 165-166). He did not hide, nor did he agree to hide Callahan's aircraft (8R. 214-216).

The petitioner acknowledges that the evidence must be viewed in a light most favorable to the government, but insists that an accurate statement of the record is critical to this Court's evaluation of the decsion by the court below. The distinctions drawn by the government between this case and *United States* v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), are not truly distinctions in that they are based upon a misstatement of the record. An examination of the record and the evidence accurately reflected therein makes clear that the Tenth Circuit made no finding of a specific act by Graham Kendall in furthering a specific illegal objective.

II. THE GOVERNMENT'S RESPONSE MISSTATES THE TRAVEL ACT QUESTION AND DOES NOT SQUARELY ADDRESS THE ISSUES BEFORE THIS COURT.

There is a clear and irreconcilable conflict between the Sixth and Tenth Circuits on the need for proof that one must knowingly cause interstate travel. The government's reliance upon *United States* v. *Gallo*, 763 F.2d 1504 (6th Cir. 1985), to dispel the existence of a conflict is misplaced (O.B. p. 7). In footnote 25 at page 1521 of the *Gallo* opinion one panel of the United States Court of Appeals for the Sixth Circuit has recognized the conflict and questioned the validity of the Sixth Circuit's position on the knowledge requirement. Far from dispelling the existence of the conflict *Gallo* again confirms its existence. The court held that the defendants who had raised the issue had either *required* other members of the conspiracy to travel interstate or had traveled interstate themselves. *United States* v. *Gallo*, 763 F.2d 1504, 1521 and 1522 (6th Cir. 1985). There is no evidence of either in the record below. Had this case been heard by the Sixth Circuit, the conviction of petitioner on Count I would have been reversed because of the holding in *Alsobrook* v. *United States*, 620 F.2d 139 (6th Cir. 1980). The court noted at page 1521 the continuing validity of the knowledge requirement as set forth in *Alsobrook*.

The need for resolution of the conflict between the circuits in the instant case is similar to *Laing* v. *United States*, 423 U.S. 161, 46 L.Ed.2d 416, 96 S.Ct. 473 (1976) and *United States* v. *Feola*, 420 U.S. 671, 43 L.Ed.2d 541, 95 S.Ct. 1255 (1975), in that the issue before the Court is troublesome and is pending in numerous lower courts. As in *Laing* and *Feola*, an early decision by this Court is desirable to further

the goal of uniformity in construction and interpretation of the elements of federal criminal statutes.

As the government admits (O.B. p. 8), this Court held in *Rewis* v. *United States*, 401 U.S. 808 at 813, that the interstate nexus necessary for a conviction under the Travel Act could not be established by merely demonstrating that interstate travel was reasonably foreseeable. The United States Court of Appeals for the Tenth Circuit has done precisely what the Court in *Rewis* held it could not, by upholding Graham Kendall's conviction based upon reasonable foreseeability of interstate travel. In order to circumvent *Rewis* and support the opinion of the court below, the government has set up a straw man by correctly noting that "there is no requirement in the Travel Act that a defendant . . . have knowledge of the intended interstate means." (O.B. p. 8). While the statement is valid, it attributes to the petitioner a position that he has never taken. Although the argument of the government and the decision of the court below is couched in terms of "causing" a violation of the Travel Act, a perfunctory analysis reveals that Graham Kendall's conviction was upheld on the basis of the foreseeability of interstate travel.[3] The Court of Appeals concluded that the petitioner, "knowing that Geittmann did not live in Oklahoma . . ., could reasonably have known . . . that Callahan and Geittmann would have to meet to arrange the details of the smuggling trip and that interstate travel for this purpose was verly likely." If "could reasonably have known" is not a synonym for foreseeability, then

[3] Please note that the indictment made no reference to 18 U.S.C. § 2 (the aiding and abetting statute).

none exists. The quality of the court's analysis is not changed by the allegation that Kendall,

> Knowing both Callahan's desire to be hired as a pilot for marijuana smuggling and Geittmann's need for a pilot and plane, introduced the two men for the purpose of assisting them in an illegal narcotics venture. This introduction, in the context of this case, constitutes a sufficient causal connection necessary for violation of 18 U.S.C. §2. (Pet.App. 11a-12a)

The fallacy of the government's position and the holding by the court below is that at the time of the introduction there was no illegal business enterprise that Graham Kendall could have furthered. Thus, there are actually two stages of foreseeability in the government's argument. Graham Kendall's conviction was upheld based upon the foreseeability of illegal business enterprise and foreseeability of interstate travel in furtherance thereof.

Finally, the petitioner has never taken the position that Callahan, Geittmann, or both, were not involved in a "business enterprise" within the meaning of 18 U.S.C. § 1952 (b)(1). As set forth at pages 22 and 23 of the original petition for certiorari, Kendall's position is that it was certainly not his business enterprise that was relied upon to uphold his conviction, nor did he have knowledge of any business enterprise which could support a conviction for a Travel Act offense. The government's argument is based upon the activities of Callahan and Geittmann which might rise to the level of "business enterprise". Both Callahan and Geittmann testified that at some time or other they told the petitioner about part of their illegal activities, but these must be analyzed in the context in which they occurred. Over a number of years and during the course of

legitimate aircraft sales the co-defendants may have alluded to some illegal activity. This, however, must be recognized as what it truly is, a foreseeability argument. Indeed, the United States Court of Appeals for the Tenth Circuit has broadened the ambit of the Travel Act beyond the scope permitted by the holding in *Rewis*.

CONCLUSION

In *Krulewitch* v. *United States*, 336 U.S. 440, 93 L.Ed. 790, 67 S.Ct. 716 (1949), and *Grunewald* v. *United States*, 350 U.S. 391 (1957), this Court recognized the dangers inherent in allegations of conspiracy. As Justice Harlan forcefully warned, "we will view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" (353 U.S. at 404). The conflicts between the Ninth and Tenth Circuits on the issue of the critical elements in a conspiracy charge, and the conflict between the Sixth and Tenth Circuits on the foreseeability issue in a Travel Act prosecution are genuine and irreconcilable. The United States Court of Appeals for the Tenth Circuit has impermissably broadened the ambit of the Travel Act in violation of this Court's holding in *Rewis*. For these reasons and the reasons set forth in the original petition, a writ of certiorari should be granted and the judgments of conviction should be reversed with instructions that the cases be dismissed.

Respectfully submitted,

STEPHEN JONES
of
JONES, BLAKLEY & JENNINGS
P.O. Box 472
Enid, Oklahoma 73702
405/242-5500

Counsel of Record for Petitioner
Graham Lee Kendall

January, 1986

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the above and foregoing Petitioner's Reply Brief were served on the required parties by placing same in the United States Mail with postage fully prepaid, this ..... day of January, 1986, to:

Rex E. Lee
Solicitor General
Office of the Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

Stephen Jones